

COUNCIL ON COURT PROCEDURES

Minutes of Meeting of March 9, 2002

5200 Southwest Meadows Road

Oregon State Bar Center

Lake Oswego, Oregon

Present: Lisa A. Amato Nicolette D. Johnston
Benjamin M. Bloom Alexander D. Libmann
Eugene H. Buckle Connie Elkins McKelvey
Ted Carp Jeffrey S. Merrick
Kathryn H. Clarke Shelley D. Russell
Allan H. Coon David Schuman
Robert D. Durham Ralph C. Spooner
Daniel L. Harris David F. Sugerman
Rodger J. Isaacson John L. Svoboda
Nely L. Johnson

Excused: Richard L. Barron
Bruce J. Brothers
Don A. Dickey
Karsten Hans Rasmussen

Also present were Maury Holland, Executive Director, and Gilma Henthorne, Executive Assistant.

Agenda Item 1: Call to order. The Chair, Mr. Spooner, called the meeting to order at 9:37 a.m.

Agenda Item 2: Approval of minutes. The minutes of the 2/9/02 Council meeting were, without objection or correction, approved as distributed with the agenda of this meeting.

Agenda Item 3: Progress reports and discussion regarding current ORCP amendment projects (Mr. Spooner).

3a. Proposal to amend ORCP 34 B(2) (see Attachment "A" to 3-9-02 agenda) (Mr. Brothers). It was decided to defer further consideration of this item until a meeting when Mr. Brothers could be present.

3b. Proposal to substitute declarations under penalty of perjury for affidavits throughout the ORCP (Mr. Spooner). Mr. Spooner reported that he had been in contact with Mr. Jeff Johnson, who is Chair of the OSB Committee on Practice & Procedure ("CPP"), and further reported that Mr. Johnson and Mr. John Coletti would coordinate with the Council any activities regarding this item on the part of the CPP. Mr. Spooner added that it was by no means certain whether the CPP would have the time or inclination during this biennium to develop the proposed statutory amendments that would almost certainly be required should the Council decide that substituting declarations for affidavits, at some or all places in the ORCP where the latter are called for, would be desirable.

Judge Harris stated that since he was the member who brought this proposal to the Council's attention, he would volunteer to serve on a committee to work on it, including liaison with the CPP. Mr. Spooner responded that he did not think a committee was needed at this point, that liaison with the CPP could continue to be handled by Mr. Libmann and himself, and Prof. Holland could continue to do the necessary statutory research. Justice Durham commented that, if this project were to move forward, very thorough research would have to be undertaken so that all ramifications of either substituting declarations for affidavits, or providing that declarations might be used optionally in lieu of affidavits, could be very carefully considered.

Prof. Holland was asked to continue his research on the question of whether substitution of declarations for affidavits, or, alternatively, providing for declarations as alternatives to affidavits at all or some places throughout the ORCP where only affidavits are now permitted, would be consistent with current ORS provisions regarding affidavits, sworn testimony, and liability to prosecution for perjury or false statement. Prof. Holland stated that he would complete as much of this work as possible in time to distribute a memo prior to the April 13 Council meeting. Ms. Russell noted that declarations are now used in lieu of affidavits in federal court, including in connection with summary judgment motions, and that there appear to have been no objections or difficulties about this.

3c. Proposal to amend ORCP 31 (see Attachment "B" to 3-9-02 agenda) (Mr. Svoboda). Mr. Svoboda reported that he thought this item raised an issue within the purview of the OSB Ethics Committee rather than the Council. Prof. Holland reported that he had contacted Mr. Roger Harris to ask him whether he could suggest any way his suggestions

might be accomplished by means of a Council-promulgated amendment to ORCP 31 in light of attorney fee-shifting being outside the scope of the Council's statutory powers, but had received no response. On a unanimous voice vote it was decided to table this item indefinitely.

3d. Report of Jury Innovation Committee (Judge Harris). Judge Harris reported that this committee had narrowed down the jury innovation amendments it was considering this biennium to the following three: i. the alternate juror rule (i.e., ORCP 57 F), ii. jury instructions (i.e., ORCP 59), and iii. an amendment that would allow post-trial debriefing of willing jurors in the presence of counsel. In response to a question by Mr. Buckle, Judge Harris said that one change under consideration was that alternate jurors would not be informed of that status until the conclusion of trial and just before the jury was sent out to deliberate. Judge Harris added that the time did not seem ripe for a possible change requiring jurors to be provided with written copies of instructions in light of the current budgetary situation.

3e. Report of Medical Records Committee (Mr. Merrick). Mr. Merrick distributed copies of a memorandum he had addressed to all members of this committee (a copy of which is filed with these minutes). Mr. Libmann stated that the CPP, of which he is a member, has a subcommittee chaired by Mr. John Coletti working on the various impacts of the imminently effective federal HIPAA privacy regulations on the ORS, the ORCP, and the UTCR, and added that the CPP was looking to the Council to take the lead and provide guidance respecting the impact on the ORCP. Mr. Spooner commented that the current ORCP provisions regarding health care records are likely to be inconsistent with the HIPAA regulations in various respects.

Mr. Merrick reported that this committee had met, its work was well underway, and that, as shown in the memo he had distributed, drafting assignments had been made to committee members to prepare proposed amending language regarding a new subpoena rule, a new form of qualified protective order, and a new form of affidavit by custodians of medical records. Prof. Holland suggested that one thing this committee should look into is the apparent contradiction between ORCP 44 C and OEC Rules 504-1 and 511. He explained that ORCP 44 C is a discovery rule that is unique in calling for production of material that is entirely privileged and thus not discoverable under ORCP 36 B(1). There thus seems to be a contradiction between Subsection 36 B(1) and Section 44 C.

Mr. Merrick also stated that one complicating factor is that the HIPAA regulations give patients the right to have their medical records amended, which would seem to create the potential for litigation between patients and health care professionals. Ms. McKelvey commented that this particular provision of the HIPAA regulations will require an amendment to ORS Chapter 192.

Prof. Holland asked whether committee members thought it would be helpful if he were to undertake some research into what, if anything, other states might be doing by way of adjusting their medical records discovery rules to the HIPAA regulations. Ms. McKelvey responded that Oregon's law respecting medical records is so different from that of other states that she did not think learning what other states might be doing would be especially helpful or worthwhile.

Mr. Buckle and other members stated that any proposed amendments should try to solve, or at least mitigate, the problem of different parties winding up with different records in the same case. Other members mentioned the long expressed wish on the part of health care records custodians to be relieved of the burden of having to furnish multiple copies of the same records in the same case.

Mr. Spooner remarked that he strongly believed that, in amending Rules 44 and 55, the ability to subpoena health care records directly from health care providers should be preserved. Judge Harris observed that different records custodians sometimes have different ideas about what records should be provided in response to subpoenas. Discussion of this item concluded with general agreement that, at a minimum, Rules 44 and 55 would have to be amended to comply with HIPAA, and, beyond that, improved to whatever extent is possible.

Agenda Item 4: (Old business) (Mr. Spooner)

4a. Possible amendment to, or comment on, ORCP 68 (Justice Durham).

Justice Durham referred members to a proposed amendment he had drafted to ORCP 68, as requested at the February 9 Council meeting, the purpose of which was to alert lawyers to the fact that rulings on attorney fee requests and objections are governed by ORS 20.075. (A copy of this draft amendment is filed with the original of these minutes.) He noted that his proposal would accomplish this purpose by tacking on a clause to Subparagraph 68 C(4)(c)(i), but stated that he would welcome suggestions of other ways of accomplishing it which might be better.

Judge Harris asked Justice Durham why his proposed amendment did not take the form of a separately numbered paragraph or subparagraph that would replicate the factors included in ORS 20.075. Justice Durham responded that proceeding in that way might improve the amendment, but noted that it would have the disadvantage of requiring an amendment to ORCP 68 C(4) every time ORS 20.075 might be amended.

Judge Johnson asked whether the fact that the amendment would be added to ORCP 68 C(4)(c), which deals with hearings on objections, might encourage an assumption that ORS 20.075 applies only when objections are filed. Justice Durham responded such an assumption would, in fact, be correct in the sense that, if no objections are filed, there is nothing to adjudicate. Judge Harris commented that attorney fees are sometimes requested in default cases.

Mr. Merrick asked whether the proposed amending language should be "any other statute, rule, or authority" instead of "any other statute or rule." Justice Durham replied that he had considered the formulation suggested by Mr. Merrick, but finally rejected it on the basis that all the cases dealing with attorney fees come down to interpretations of ORS 20.075 or ORAP 13.10.

Judge Schuman suggested that "ORS 20.075 and any other statute or rule" be changed to "ORS 20.075 or any other statute or rule." Judge Isaacson expressed agreement with this suggestion because, he explained, the use of "and" would suggest that some other statute or rule, apart from ORS 20.075, is always applicable. General agreement was then expressed with Judge Schuman's suggestion.

Mr. Spooner then called for a straw vote approving or disapproving the amendment as proposed by Justice Durham as changed in accordance with Judge Schuman's suggestion. The straw vote was 19 in favor, 0 opposed to table the amendment until the September Council meeting when a vote would be taken on its tentative adoption for publication and comment.

4b. Possible amendment of ORCP 44 A regarding conditions under which court-ordered physical or mental examinations are conducted (see Attachment C to 3-9-02 agenda) (Ms. Clarke). Mr. Spooner stated that he had agreed to Ms. Clarke's suggestion that the possibility of revisiting various issues surrounding court-ordered physical or mental examinations during this biennium not be foreclosed, and hence that this item should be continued on the Council's current biennial agenda. Ms. Clarke asked that further consideration of this item be deferred until the April or other future Council meeting. She added that there was considerable interest in this matter on the part of OTLA, and that she would soon be in contact with OADC to inquire whether that organization also has an interest in addressing the issues that surfaced during the 1999-2001 biennium or possibly other related ones. There was general agreement that this item be continued on the Council's agenda.

4c. Possible amendment of one or more discovery rules to make clear duty to update responses to discovery (see Attachment E to 3-9-02 agenda) (Mr. Sugerman). Mr. Sugerman said that an issue that comes up occasionally in Oregon courts, which is not answered by the current discovery rules (ORCP 36 through 46), is whether a party who has responded to discovery is under any duty subsequently to supplement or update those responses in light of later-acquired information showing that the initial responses were erroneous or incomplete. He noted that the Federal Rules of Civil Procedure ("FRCP") include a provision specifically dealing with this question, FRCP 26(e)(2). Mr. Sugerman added that he had shown this draft proposal to Ms. Amato, who agreed with him that any duty of supplementation should not extend to deposition answers as it was thought that would be unduly burdensome for counsel. Thus, he explained, the draft proposal would impose the duty of supplementation only

on Rule 43 requests for production and Rule 45 requests for admissions. He further explained that while the current ORCP 36-46 leave the question unanswered, he personally has always assumed there is an implied duty of supplementation and believed that many lawyers and trial judges operate under the same assumption.

Judge Johnson asked whether, if a supplementation duty were prescribed, it might be preferable to require that supplemental responses be furnished by a date certain prior to trial, thus avoiding the uncertainty of the meaning of the word "seasonably." Justice Durham said he would prefer that language such as "within a reasonable time," or "as soon as possible," or "as soon as reasonably possible" be substituted for "seasonably," and also suggested inclusion of the following language immediately following "(b)*": "the party has not disclosed the after-acquired information to the requesting party" in lieu of "the after-acquired information has not otherwise been made known to the requesting party ...". Mr. Sugerman suggested that the following might be better: "(b) the party has not otherwise disclosed the after-acquired information to the requesting party in writing," with which suggestion there seemed to be general agreement.

Mr. Buckle queried whether this new supplementation duty would trigger a sanction if, for example, a defense counsel filed an amended answer admitting liability a week before trial. Judge Johnson noted that a supplementation duty as applied to requests for admissions might discourage counsel from agreeing at trial that certain issues need not be tried because not seriously contested. Prof. Holland queried whether it would be sensible to impose a supplementation duty on Rule 45 admissions, since the purpose of requests for admissions is less to obtain more or later information than it is to lock things in place.

Discussion of this item concluded with general agreement that it would be continued on the Council's agenda and with a suggestion to Mr. Sugerman that he further refine his draft proposal in light of the discussion at this meeting.

4d. Tentative adoption of amended Barron amendment to ORCP 47 C.

There was agreement without objection that this amendment had been approved at the Council's 2-9-02 meeting, and that it should therefore be tabled until the Council's September 2002 meeting when it would be called up for voting on its tentative adoption for publication and comment.

*There was general agreement that the "a" and "b" in this draft should be enclosed in parentheses as "(a)" and "(b)."

Agenda Item 5: New business (Mr. Spooner):

5a. Possible technical amendment to ORCP 27 B (see Attachment D to agenda of this meeting). Without objection it was agreed that this item would be continued on the Council's agenda for consideration at a meeting when Judge Rasmussen is present.

5b. Possible need to amend ORCP 19 B (Mr. Bloom). Mr. Bloom raised the question whether it might be useful to amend ORCP 19 B to eliminate any among the specified affirmative defenses that are no longer valid as a matter of substantive law, such as, for example, contributory negligence. Mr. Spooner responded that Mr. Bloom was certainly welcome to take a stab at amending Section 19 B. Ms. Clarke commented that, despite major changes in substantive tort law, there might nonetheless be good reason to retain the affirmative defense of contributory negligence as there might still be cases where it is applicable.

Agenda Item 6: Adjournment (Mr. Spooner). Without objection Mr. Spooner declared the meeting adjourned at 11:53 a.m.

Respectfully submitted,

Maury Holland
Executive Director